Supreme Court, U.S.
FILED
OCT 25 2000
CLERK

(2)

No. 00-532

In The

Supreme Court of the United States

CHARLES O. GRIGSON, as Trustee for the Owners of *The Texas Chainsaw Massacre*, RIVER CITY FILMS, INC., and ULTRA MUCHOS, INC.,

Petitioners,

vs.

CREATIVE ARTISTS AGENCY, L.L.C. AND MATTHEW DAVID McCONAUGHEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

M. Scott Incerto
Clint E. Jones
Tanya J. Pierce
Fulbright & Jaworski L.L.P.
600 Congress, Suite 2400
Austin, Texas 78701
(512) 474-5201
Fax: (512) 320-4598

William J. Boyce*
Fulbright & Jaworski L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
(713) 651-5151
Fax: (713) 651-5246
*Counsel of Record

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Whether the federal policy favoring arbitration encompasses a claim for tortious interference asserted against non-signatories accused of concerted misconduct with signatories to a contract containing an arbitration clause.

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STATEMENT OF THE CASE

The facts necessary to address the arguments set forth in Grigson's Petition are adequately presented in the Fifth Circuit's opinion. *See* Pet. App. 2a-5a; 9a-14a.

Grigson's Petition includes a more elaborate description of the underlying facts, asserting (among other things) that Creative Artists Agency "successfully pressured TriStar" and that "TriStar succumbed to Creative Artists and made only a limited theatrical release." Petition at 5. These statements are paraphrases of unproven allegations contained in the Plaintiffs' Original Petition filed in Texas state court. *See id.; compare* R. 21. Grigson's allegations of misconduct by Creative Artists Agency and McConaughey were made "upon information and belief." R. 21. Due to the district court's resolution of the arbitration issue, the case never proceeded to the stage where Grigson was required to proffer evidence in support of his allegations on the merits of his claims. The respondents denied Grigson's allegations that TriStar was pressured. R. 231-32, 236.

Grigson's statement that the district court "granted the motion to compel arbitration" is incomplete. Petition at 6. Creative Artists and McConaughey filed Defendants' Motion to Dismiss or Alternatively to Stay Proceedings and Compel Arbitration. R. 85. Creative Artists and McConaughey sought dismissal for improper venue under Federal Rule of Civil Procedure 12(b)(3) because the arbitration clause required arbitration in Los Angeles, California. R. 94. The district court's order and judgment stated that the case was being dismissed based on improper venue pursuant to Rule 12(b)(3) and 28 U.S.C.

§ 1406(a); the judgment and order did not say that arbitration was being compelled, although that was the practical effect of the dismissal. Pet. App. 43a; 45a.

Grigson's passing reference to his prior suit against Columbia TriStar Home Video, Inc., and the dismissal of that prior suit after a motion to compel arbitration was filed, also presents an incomplete picture of the posture of this case. *See* Petition at 5.

As the Fifth Circuit observed, Grigson engaged in an "obvious attempt to make an end-run around the arbitration clause" by (1) first suing TriStar on the contract containing the arbitration clause, and then (2) dropping the suit against TriStar in favor of a second suit against non-signatories for allegedly pressuring TriStar and interfering with that same contract. Pet. App. 11a-12a. "[T]his is a quite obvious, if not blatant, attempt to bypass the agreement's arbitration clause." Pet. App. 12a.

These circumstances form the backdrop against which the courts below were required to assess the strong federal policy favoring arbitration and its application to this case.

ARGUMENT

This case involves the application of federal policy favoring arbitration in light of Grigson's "quite obvious, if not blatant, attempt to bypass" an arbitration clause. Pet. App. 12a. The district court correctly rejected this "obvious attempt to make an end-run around the arbitration clause" (Pet. App. 11a) by dismissing Grigson's suit

so it could be arbitrated in the proper venue. Pet. App. 43a-45a. In affirming this decision, the Fifth Circuit properly applied this Court's teaching regarding the favored status of arbitration and ruled in a manner consistent with the approach taken by the Seventh and Eleventh Circuits.

The court of appeals' decision is correct. It creates no conflict with the decisions of this Court or any other court of appeals. The decision addresses a uniquely fact-bound situation and therefore presents no issue of broad public importance requiring this Court's intervention. Further review is not warranted.

I. The Courts Below Correctly Applied Federal Policy Favoring Arbitration and Properly Rejected Grigson's "Obvious" Attempt to Avoid Arbitration

The starting point of the analysis must be the policy favoring arbitration under federal law. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

The arbitration clause in the distribution agreement with TriStar provides that arbitration in California is the exclusive forum in which any disputes related to the distribution agreement are to be decided. The clause states that

> . . . any dispute or controversy relating to any of the matters referred to in clauses (d)(i), (ii) or (iii), above, shall be decided by a Rent-A-Judge, mutually selected by the parties (or, if they cannot agree, by the Presiding Judge of the Los

> Angeles Superior Court) appointed in accordance with California Code of Civil Procedure Section 638, sitting without a jury, in Los Angeles County California, and the Parties hereby submit to the jurisdiction of such court.

Pet. App. 4a.

Paragraphs 22(d)(i) through (iii) provide that the arbitration clause covers disputes relating to:

> (i) the validity and interpretation of this agreement, (ii) the performance by the Parties of their respective obligations hereunder, and (iii) ***all other causes of action (whether sounding in contract or in tort) arising out of or relating to this Agreement***. . . .

Pet. App. 4a-5a (emphasis added). Grigson's prompt dismissal of his initial suit against TriStar after TriStar moved to compel arbitration serves as a tacit admission that the arbitration clause encompasses claims that the *Chainsaw* movie was not promoted with sufficient vigor. *See* Pet. App. 11a-12a.

The federal policy favoring arbitration would be thwarted if dodging an arbitration clause was as easy as alleging that a non-signatory tortiously interfered with the contract containing the arbitration clause. *See* Pet. App. 8a. "[I]t would be especially inequitable where, as here, a signatory non-defendant is charged with interdependent and concerted misconduct with a non-signatory defendant." *Id.*

Thus, the panel majority's holding properly prevents Grigson from trying to have it both ways by (1) seeking

to hold a non-signatory liable pursuant to the agreement's terms, while (2) simultaneously denying the enforceability of the agreement's arbitration term as to the non-signatory. *Id.*

Grigson cannot escape the logical force of this conclusion by characterizing the panel majority's decision as a dangerous "equitable discretion overlay" that "threatens to extinguish the rights of many parties. . . . " Petition at 11, 13. The panel majority's opinion faithfully upholds the right to arbitration consistent with this Court's command that "district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 218 (1985) (original emphasis). That is just what the district court did here in the context of contract language peculiar to the entertainment industry and the unique facts surrounding Grigson's efforts to bypass a broad arbitration clause.

Nor can Grigson create an issue worthy of review by seizing on the notion of district courts using boundless and unreviewable "discretion" to decide questions of arbitrability. The panel majority defined "abuse of discretion" as follows: "To constitute an abuse of discretion, the district court's decision must be either premised on an application of the law that is erroneous, or on an assessment of the evidence that is clearly erroneous." Pet. App. 9a. This formulation comports with this Court's teaching. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48 (1995) (review of decision on whether parties agreed to arbitrate "should proceed like review of any other district court decision finding an agreement between parties, e.g., accepting findings of fact that are

not 'clearly erroneous' but deciding questions of law de novo") (citations omitted).

II. The Fifth Circuit's Opinion Comports With Every Other Circuit Addressing the Federal Policy Favoring Arbitration Under These Circumstances

Courts routinely enforce arbitration agreements in cases involving tortious interference claims when, as here, such claims "arose out of" the contract subject to the interference. *See, e.g., Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 755 (11th Cir. 1993) ("any controversy or claim arising out of or relating to this Agreement" encompassed tortious interference claim); *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 343 (11th Cir. 1984) ("any controversy 'arising out of or relating to this [contract] . . . ' " encompassed tortious interference claim); *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 837 (7th Cir. 1981) ("all disputes 'arising out of, or relating to, this contract or the breach thereof . . . shall be decided by arbitration' " encompassed tortious interference claim).

The panel majority's holding therefore maintains uniformity among the circuits by rejecting efforts to avoid arbitration via tortious interference claims. Non-signatory parties properly enforce arbitration clauses under an equitable estoppel theory where the claims against them are "fundamentally grounded" in, "intimately founded in and intertwined with" or arise out of and relate directly to the agreement containing the arbitration clause. *See, e.g., Sunkist*, 10 F.3d at 758; *McBro*, 741 F.2d at 344; *Hughes*,

659 F.2d at 838. Consistent with federal policy, the equitable estoppel theory prevents a plaintiff from having it both ways; it precludes a plaintiff from relying on a contract when it works to the plaintiff's advantage and simultaneously ignoring other portions of the same contract with which the plaintiff does not want to comply. *See Hughes*, 659 F.2d at 839.

III. The Result Here Comports With State Law

Grigson's complaint that state-law principles have been trampled is difficult to square with the reported case law. Courts in Texas have applied the doctrine of equitable estoppel to prevent parties from relying on certain portions of a contract to support their claims while repudiating other portions of the contract. *See, e.g., Carlin v. 3V Inc.*, 928 S.W.2d 291, 294-96 (Tex. App. – Houston [14th Dist.] 1996, no writ). In *Carlin*, the court held that 3V was equitably estopped to avoid arbitration of its claims against a non-signatory since 3V's claims arose out of and were directly related to an agreement containing the arbitration provision. *Id.* at 297. *See also Merrill Lynch, Pierce, Fenner & Smith v. Eddings*, 838 S.W.2d 874, 880 (Tex. App. – Waco 1992, writ denied). The panel majority's result is consistent with Texas law.

IV. The Courts Below Were Not Asked to Evaluate a Blanket Prohibition of an Equitable Estoppel/ Intertwining Theory

Grigson's Petition launches a frontal assault on the intertwining/equitable estoppel theory now applied by the Fifth, Seventh, and Eleventh Circuits, declaring it

antithetical under all circumstances to the Seventh Amendment and the principles underlying the FAA. *See* Petition at 12 ("Discretionary additions or subtractions to or from [the core FAA requirement] . . . in the name of equity and fairness, using such amorphous doctrines as 'intertwined' claims, have no place under the statute and its contract law grounding").

This is a shift from Grigson's position before the Fifth Circuit. There he relied primarily upon a narrower argument (1) acknowledging that non-signatories can arbitrate in situations involving a "special relationship" with signatories to a contract containing an arbitration clause; and (2) urging that no such "special relationship" exists under the particular facts and circumstances of this case. *See* Brief For Appellants at 17-18, 21-24.

It is one thing to argue that a recognized theory does not apply under particular facts. It is quite another to argue that the same theory should not be recognized or applied under ***any*** set of facts. *See* Petition at 15 ("Just as the Court in *Dean Witter* redirected the three federal circuits whose arbitration theories had strayed beyond the confines of the FAA, so should the Court in this case redirect the three circuits who again are straying from the FAA, using the same theory but moving into a different forbidden field of equitable discretion in federal arbitration law"); *compare* Pet. App. 5a ("Appellants contend . . . they are *not* required to arbitrate with Defendants . . . because, in the alternative, Defendants do not fall within what Appellants view as the quite limited bases for application of equitable estoppel to compel

arbitration: either a special relationship to the distribution agreement signatories, or a role in carrying out the agreement's obligations") (original emphasis).

In the absence of a circuit split, Grigson has tried to cobble together an issue worthy of this Court's attention by extrapolating from *Dean Witter*. *See* Petition at 12. Grigson did not cite *Dean Witter* in his opening Fifth Circuit brief, his reply brief, or his petition for rehearing en banc. Nor did he cite *Dean Witter* in his trial court briefing. R. 179-90. Grigson did not contend below, as he does in this Court, that *Dean Witter* "removed that 'doctrine of intertwining' from federal arbitration law." Petition at 11. The closest he came to making such an argument in his panel briefing was a passing criticism of the equitable estoppel/intertwining theory as "somewhat of a legal stretch." Brief For Appellants at 25. The primary thrust of his argument below was a fact-intensive contention that "[t]he relationships to the contract and the contracting parties that are required under the estoppel exception simply are not present in this case." *Id.*

Perhaps following Grigson's lead, the dissent also does not analyze this case in terms of a conflict with *Dean Witter* or any purported invalidation of an intertwining theory by *Dean Witter*. *See* Pet. App. 14a-35a. The dissent devotes most of its effort to distinguishing the Seventh and Eleventh Circuit cases on their facts, and argues that these cases really involve an implied-in-fact agreement to arbitrate rather than an equitable estoppel situation. *Id.* at 19a-26a. That too is a different argument from the one presented in Grigson's Petition.

Under these circumstances, the Fifth Circuit and the district court were not clearly asked to resolve a facial challenge to the intertwining/equitable estoppel theory as

it has been framed in Grigson's Petition, and these courts were not afforded a fair opportunity to evaluate such a challenge. This Court in turn has been denied the benefit of the lower courts' consideration, refinement, and resolution of the issue presented in Grigson's Petition.

Therefore, this Court should follow its ordinary practice and decline to consider a question that has not been raised in the lower court. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976); *see also First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 280 n.16 (1968) ("[W]e cannot attribute error to the courts below for their failure to discern such a theory, nor would it be appropriate at this stage in the case for us to pass upon petitioner's theory . . . ").

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

M. Scott Incerto
Clint E. Jones
Tanya J. Pierce
Fulbright & Jaworski L.L.P.
600 Congress, Suite 2400
Austin, Texas 78701
(512) 474-5201
Fax: (512) 320-4598

William J. Boyce*
Fulbright & Jaworski L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
(713) 651-5151
Fax: (713) 651-5246
*Counsel of Record

Attorneys for Respondents Creative Artists Agency, L.L.C. and Matthew David McConaughey